

1 STAFF BRIEFING - ORAL ARGUMENTS - DELIBERATIONS
2 BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION
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5 In the Matter of DOC Complaint Against
Vonage Holdings Corporation
6

7 MPUC DOCKET NO. P-6214/C-03-108
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Minnesota Public Utilities Commission
15 350 Metro Square Building
121 Seventh Place East
16 St. Paul, Minnesota
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19 AUGUST 13, 2003
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22 TAPE TRANSCRIBED BY: Janet Shaddix Elling, RPR
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1 (Side A of Tape 03-93.)

2 CHAIR KOPPENDRAYER: -- ready to go, the
3 parties are at the table already.

4 MR. OBERLANDER: Good morning,
5 Commissioners. Commissioners, item number one on
6 the Commission's telecommunications agenda is
7 consideration of a complaint brought by the
8 Minnesota Department of Commerce against Vonage
9 Holdings Corporation regarding a lack of authority
10 to operate in Minnesota.

11 Commission staff has prepared briefing
12 papers for this item. There have been a number of
13 filings that came in after the briefing papers
14 were issued. Mr. Mitchell does have brief
15 introductory comments and an update for the
16 Commission regarding the new documents.

17 CHAIR KOPPENDRAYER: Thank you.
18 Mr. Mitchell.

19 MR. MITCHELL: Mr. Chair and
20 Commissioners, this is the second time you've met
21 on a petition by the Department, which is a
22 complaint that Vonage Holdings Company is
23 providing telephone service in Minnesota without
24 the certificate issued by the Commission and
25 without obeying Commission rules.

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1 There is, in staff's opinion, one issue,
2 and that is do you have jurisdiction. And in
3 staff's opinion that question is answered by the
4 Commission in its determination of whether or not
5 Vonage is offering telephone service in
6 Minnesota.

7 I'd like to point out that besides the
8 Department and Vonage, we have had petitions from
9 MCI, Level 3 Communications, AT&T, Motorola,
10 Sprint, and the Minnesota Independent Coalition.
11 Many of them have asked for participation in front
12 of the Commission, at least in oral argument. So
13 there are quite a number of parties that may want
14 to speak to you.

15 CHAIR KOPPENDRAYER: And then did you
16 want us to accept these late-filed comments that
17 you placed over here for some to see?

18 MR. MITCHELL: Yeah, what I put over
19 there was a list of late-filed comments. So if
20 anyone in the -- in the audience wants to see
21 that, there's a little stack over there.

22 CHAIR KOPPENDRAYER: Okay. Well, just
23 take that for information. Why don't we -- is
24 there questions of Mr. Mitchell? Why don't we
25 start with Mr. Alpert and introduce ourselves for

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1 the record.

2 MR. ALPERT: Thank you, Chair,
3 Commission. Steve Alpert, representing the
4 Department.

5 MS. COCHRAN: Good morning. Jeanne
6 Cochran from the Office of the Attorney General.

7 MR. JOHNSON: Rick Johnson, representing
8 the MIC.

9 MR. MERZ: Good morning, Mr. Chair,
10 Commissioners. Greg Merz, with the Gray, Plant
11 Mooty law firm, I'm doing double duty today,
12 representing MCI and Vonage. Mr. -- to my left,
13 Mr. Wilhelm, will be speaking on behalf of Vonage
14 today, and I'll be speaking on behalf of MCI.

15 MR. DOBRAS: Mr. Chairman,
16 Commissioners, Victor Dobras, representing
17 Sprint.

18 CHAIR KOPPENDRAYER: So, Mr. Merz,
19 you're representing Vonage, you said?

20 MR. MERZ: Both Vonage and MCI, although
21 I'll speak today on behalf of MCI and Mr. Wilhelm
22 will be speaking on behalf of Vonage.

23 CHAIR KOPPENDRAYER: So, Mr. Wilhelm,
24 you want to go first?

25 MR. WILHELM: Thank you, Mr. Chairman,

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1 Commissioners. I thought it would be useful as an
2 initial matter just to update the Commission with
3 respect to the follow-up items from the last
4 meeting concerning the 911 services. If you
5 recall, the Commission had encouraged us to speak
6 with the Metropolitan 911 Board and the Department
7 of Administration regarding our provisioning of
8 emergency services.

9 Following the meeting we had a
10 conference with those parties, and as recently as
11 last week followed up with a conference call where
12 Vonage and its technical personnel shared
13 technical information about our phased deployment
14 of 911 services with both of those parties.

15 While I don't want to speak for them, I
16 think that the company was encouraged by the sense
17 of mutual genuine cooperation. We have agreed to
18 provide them with further technical information,
19 and Pete Egman (phonetic) from the 911 Board and
20 Jim Beutelspacher from the Department of
21 Administration were generous enough to work with
22 us to try to help us overcome some of the
23 technical hurdles that I think we referred to in
24 the previous testimony as we move out from a phase
25 one to a phase two and ultimately to a phase three

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1 deployment of our emergency services.

2 With respect to the matter before you
3 today, although Vonage is very interested in
4 cooperating with the Department and the Board, and
5 we're certainly willing to educate any of the
6 parties here today, and this Commission, about the
7 technology, we believe that the proper outcome of
8 today's proceeding must be for you to dismiss the
9 Department's complaint.

10 The complaint must be dismissed first
11 because it fails to satisfy its burden that
12 there's both personal and subject matter
13 jurisdiction over the company in the services it
14 provides. Secondly, and perhaps more importantly,
15 an individual complaint proceeding is not the
16 appropriate forum to address a novel issue of
17 first impression before this Commission and of
18 such broad applicability and with such far
19 reaching consequences to so many interested and
20 diverse parties. And I think that evidence of
21 that is the fact that there are so many parties,
22 many of whom who may not -- there are so many
23 parties who have intervened in this proceeding and
24 there may be many more that are not aware of the
25 impact of the complaint against Vonage upon the

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1 be limited to the type of technology that Vonage
2 uses. Vonage is but one form of voice over IP.
3 As I think you may have become aware from some of
4 the pleadings and filings, the FCC had outlined
5 several types of VOIP technology, computer to
6 computer, phone to phone, and there's also a third
7 type that isn't covered in some of the FCC
8 proceedings, or initial proceedings, which is
9 computer to phone. So an open proceeding would
10 allow an exploration of all of these types of
11 technologies and how it might affect companies
12 provisioning their services within the state of
13 Minnesota.

14 This is in fact the approach that other
15 states have taken. Ohio and Pennsylvania have
16 opened up generic proceedings on threshold issues
17 such as jurisdiction, the technology, as well as
18 issues of federal preemption and state law.
19 Florida and Illinois have opened up workshops and
20 have had several workshops exploring the
21 technology. The FCC itself has six open
22 proceedings, one of which includes 911 services as
23 applied to VOIP.

24 And as recently as the NARUC conference
25 several weeks ago, Bill Mayor, the head of the

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1 services that they provide.

2 This Commission has discretion under
3 section 237.081 of the Minnesota Statutes to
4 dismiss the complaint, and on its own motion open
5 an investigation or other proceeding into the
6 legal, factual and technical matters surrounding
7 voice over Internet. As a matter of due process,
8 Minnesota precedent clearly states that general
9 policy questions and interpretive rules, as would
10 be the case here, must be undertaken in an open
11 proceeding or a rulemaking proceeding, and
12 certainly not in an individual complaint.

13 Vonage believes that a workshop would be
14 particularly appropriate in this instance because
15 the issues are as much technical as they are legal
16 and factual. I also believe it would be
17 appropriate because it would allow a hands-on
18 demonstration to technology as opposed to just the
19 filing of comments and reply comments. As opposed
20 to a complaint proceeding, a workshop or an open
21 proceeding would provide all parties with notice
22 and would provide all parties with an equal
23 opportunity to participate and comment on the
24 technology and the services.

25 Also, an open proceeding would not just

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1 Wireline Competition Bureau, had indicated that
2 the -- that VOIP was, in the fourth quarter of
3 this year, going to be one of the top issues that
4 the Commission would explore.

5 I should point out that no other state
6 has concluded that voice over IP, and certainly
7 the services that Vonage provides, is a telephone
8 service. Also significant, no other state has
9 filed a complaint against Vonage for the services
10 that it provides.

11 As a matter of law Vonage also believes
12 that the complaint must be dismissed. The
13 complaint before you is really a bit of a matter
14 of the cart before the horse, or perhaps the
15 Department shooting first and asking
16 jurisdictional questions later. The Department's
17 comments fail to provide any definition or
18 explanation of telephone service, the very service
19 that they allege that Vonage is providing.
20 Notably, the Department doesn't even provide a
21 legal standard for the Commission to follow in
22 applying that rule. They do not focus in on the
23 Seminole (phonetic) case, which is the Minnesota
24 Microwave case, where this issue was explored
25 before the Commission, and I suspect that's

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1 because the Court in that case decided that the
2 Commission should take a narrow interpretation of
3 the scope of the definition of telephone service,
4 leaving it to the legislature to decide if it was
5 necessary to expand that definition.

6 CHAIR KOPPENDRAYER: Did you read our
7 staff's comment on that particular issue as well?

8 MR. WILHELM: Yes, I read the staff
9 briefing paper concerning how to proceed. Vonage
10 believes that there are a number of factual
11 inaccuracies about the services that are -- or the
12 description of the services that are provided in
13 that briefing paper. The briefing paper focuses
14 somewhat on how an end-user might view this as a
15 functional equivalent to a telephone service.
16 However, there are a number of facts that are not
17 pointed out either in the Department's comments or
18 in the staff briefing paper.

19 Notably, number one, and this is
20 important because it also applies to the legal
21 standard that the Department used, which is the
22 legal standard that the FCC refers to. Number
23 one, the service requires the use of a broadband
24 Internet connection. It is not and has never been
25 advertised as being able to be used to interface

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1 with the public switched telephone network.
2 Number two, the end-user needs to have a
3 high-speed broadband connection. Third, they
4 require the use of a computer device, what we call
5 the multi-media terminal adaptor, which is in
6 essence a computer that performs protocol
7 conversion. That is, converting the packets that
8 are transmitted over the customer's third-party
9 provided broadband Internet connection and then
10 transferring those into analog packets. Those are
11 all very important functional distinctions between
12 this service and they're very important factual
13 distinctions as well, given the legal standard
14 that the Department applies, which is the standard
15 applied by the FCC both in the report to Congress
16 in 1996, as well as in the Computer Two decision,
17 where the FCC looked at, if there's a net protocol
18 conversion, then a service is enhanced, not a
19 telephone service. And the Communications Act and
20 the FCC's rules require that those are -- those
21 are mutually exclusive of one another.

22 So we would take issue with a number of
23 the factual statements made in the staff briefing
24 paper, as well as the Department's assertion that
25 there's no net protocol conversion and that we

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1 require just standard CPE, that is in fact not the
2 case.

3 So for those -- those reasons, both
4 legal and procedural, Vonage believes that the
5 complaint must be dismissed. And certainly within
6 the authority of this Commission, to open up a
7 generic proceeding, or as we believe would be
8 appropriate, a workshop. But the Department has
9 not satisfied even a threshold of showing under
10 the standard that it uses that there is
11 jurisdiction, and we believe, as has been the case
12 in other states, there should be a workshop or an
13 open proceeding to begin to explore these so all
14 other interested parties may participate. Thank
15 you.

16 CHAIR KOPPENDRAYER: Questions of
17 Mr. Wilhelm? Mr. Alpert, would you like to go
18 next?

19 MR. ALPERT: If you would like me to.
20 Chair Koppendray, Commission members, the
21 Department of Commerce supports the staff
22 recommendation. Under Minnesota law there is
23 simply no question that Vonage is providing a
24 telephone service in Minnesota. There is no issue
25 of preemption. This Commission has jurisdiction

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1 and the authority, and it goes beyond that, you
2 have the obligation to require this telephone
3 company to be regulated like others doing business
4 in Minnesota. Minnesota law requires it and there
5 is no federal law that precludes it.

6 Unless Vonage is now providing service
7 differently in Minnesota than it does in other
8 states such as Illinois, where it's changed its
9 service in the last day, I'd like to hand out to
10 the Commission part of something that came off of
11 the Vonage Web site yesterday that I'll be
12 referring to, and I've got copies for everyone.

13 COMMISSIONER JOHNSON: Thank you.

14 CHAIR KOPPENDRAYER: That's the same
15 thing, yeah.

16 (Inaudible conversation.)

17 CHAIR KOPPENDRAYER: I believe this was
18 here the last time around; wasn't it?

19 MR. ALPERT: I'm not sure if it was.
20 This I pulled off of the Internet yesterday. It's
21 a press release from Vonage announcing a service
22 in Rockford, Illinois, it's dated August 6th, and
23 would point out that Vonage, the leading provider
24 of broadband phone service announced the
25 availability of service in Illinois. The second

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1 paragraph refers to Vonage broadband telephone
 2 service. You can keep your current numbers or
 3 choose telephone numbers within the popular area
 4 code. Next paragraph, Vonage is excited to bring
 5 an affordable full featured phone service to
 6 residents and small business. We're filling a
 7 need in the Midwest for inexpensive flat rate
 8 calling plans. They refer to themselves as they
 9 -- they set the standard for the new generation
 10 of phone service. And then when you talk about
 11 About Vonage on the second page, the fastest
 12 growing telephony company in the U.S. Vonage's
 13 service area encompasses more than 1100 active
 14 rate centers in 85 U.S. markets, and they also say
 15 that Vonage currently has more than 40,000 lines
 16 in service, over 2 point million -- 2.5 million
 17 calls per week are made using digital voice, the
 18 easy to use, feature rich, flat rate phone
 19 service. There is no question that they're
 20 holding themselves out to be and they are in fact
 21 providing telephone service. And I'll get to the
 22 point that they provide it in Minnesota in just a
 23 bit.

24 Unless Vonage provides -- or if the
 25 Commission accepts Vonage's claim that it's not

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1 providing a telephone service because a portion of
 2 the call is digitized, or digitized in a
 3 particular format, then the only services this
 4 Commission really has jurisdiction over is all
 5 copper lines. Vonage, like other telephone
 6 service providers, are subject to the regulation
 7 of this Commission and must be certificated unless
 8 and until the FCC, there's rules that replace the
 9 current rules, or the state legislature enacts
 10 statutes that relieve this company from being
 11 regulated. You have the jurisdiction, you're
 12 required to certificate a company providing
 13 telephone service, and that's exactly what they
 14 provide under state law.

15 I'd like to briefly address the motion
 16 to dismiss for failure to state a claim. First of
 17 all, Minnesota is a general pleading state,
 18 specific facts are not required to be set forth in
 19 a complaint. They say there's no proof Vonage is
 20 providing service in Minnesota or actively
 21 soliciting businesses in Minnesota. I point to
 22 paragraph five of the complaint, where we allege
 23 that Vonage's Web site show that Vonage was
 24 offering service in Minnesota. In their answer
 25 Vonage admitted the accuracy of those references.

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1 They point to the affidavit of John Rego, R-E-G-O,
 2 I hope I'm pronouncing his name correctly, the CFO
 3 of Vonage, there's an affidavit attached to their
 4 answer dated July 22 of 2003 pointing out that
 5 Vonage has 426 customers in Minnesota.

6 Vonage claims that they might not be
 7 able to prevent someone from using their service
 8 while in Minnesota, that's fine, that's not what
 9 we're here about. They are actively and clearly
 10 marketing in Minnesota and marketing for Minnesota
 11 citizens for services to be used in Minnesota
 12 using Minnesota area codes. They have a contract
 13 with a gateway provider to furnish service in
 14 Minnesota by intersecting with the public switched
 15 telephone network in Minnesota.

16 And I guess, finally, if the Commission
 17 still believes that somehow the complaint is
 18 defective, we will move to amend it. There
 19 certainly isn't grounds here for a dismissal with
 20 prejudice in this particular case.

21 Vonage claims there's no subject matter
 22 jurisdiction or that somehow the FCC or federal
 23 law has preempted any action by this Commission.
 24 Vonage keeps dancing around this claim of
 25 preemption, and at best they can point to the fact

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1 that there may be a potential risk of preemption
 2 because the FCC is looking at similar but not
 3 identical issues. And as we all know, the FCC may
 4 or may not resolve those matters, and if they
 5 resolve them narrowly, as being requested by both
 6 AT&T and Pulver, they will not address the issue
 7 that's squarely before you. AT&T is apparently
 8 before the FCC on an issue of access, access
 9 charge reform dealing with long-distance service,
 10 we're dealing with local service here, in addition
 11 to the long-distance service.

12 In Pennsylvania, it was referred to by
 13 counsel that there's some open proceedings there,
 14 and in May or June of this year, because they're
 15 not dated, Vonage submitted some comments, and in
 16 response to a question by the Pennsylvania
 17 Commission as to whether they were preempted, or
 18 words to that effect, Vonage responded, quote,
 19 "The FCC has not exercised jurisdiction over
 20 Vonage's VOIP services." So Vonage has taken the
 21 position in Pennsylvania that Pennsylvania is not
 22 preempted, I don't know why they're taking a
 23 different position somehow here.

24 No definition of telephone service.
 25 Again, we don't have to state the specific facts.

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1 Vonage itself cites to the Minnesota Microwave
2 case, as did Commission staff in their briefing
3 papers. All we are asking the Commission to do is
4 look at all aspects of Vonage's service, not just
5 the analog to digital conversions. So any
6 suggestion that the Minnesota Supreme Court would
7 find that you don't have jurisdiction to hold that
8 there is telephone service in this particular case
9 is without merit.

10 We are not asking for any unduly broad
11 definition of VOIP services. We are specifically
12 asking for you to look at what Vonage does, the
13 service that they are supplying, and that's all
14 we're asking for. We are asking for a narrow look
15 at Vonage's telephony service being provided in
16 Minnesota and asking you to require them to comply
17 with Minnesota law. Anything beyond that might be
18 a proper subject matter for a public forum,
19 information gathering, investigation for action by
20 this Commission on VOIP services as a whole, or to
21 present information for the legislature to take a
22 look at it, but we're saying that Vonage is
23 providing this service and you're required to make
24 sure they're certificated to be fair to all.

25 This Commission should continue to be

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1 eyes and ears see something, and somebody says
2 don't believe that. And I thought, I just read
3 the Vonage docket and I'm being asked to
4 disbelieve the obvious.

5 MR. WILHELM: Yes, Mr. Chairman.
6 Obviously the Vonage service provides a
7 functionality that in some respects provides
8 something similar to telephone service. But the
9 legal standard, the legal standard that's applied
10 by the FCC, and we would, and this Commission has
11 in the past, and I think we pointed out in our
12 briefing papers, looked that that legal standard
13 has also been given great deference by this
14 Commission, supports the conclusion that this is
15 an information service and not a telephone
16 service. And I should -- I should point out
17 that --

18 CHAIR KOPPENDRAYER: However, the
19 information comes from a phone receiver into your
20 ear.

21 MR. WILHELM: Right, but there is a net
22 protocol conversion and that is the legal
23 standard.

24 CHAIR KOPPENDRAYER: Okay.

25 MR. WILHELM: And I should point out

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1 technology neutral, looking at the telephone
2 service and not the technology used to deliver
3 that service. Vonage's service is an
4 evolutionary, not a revolutionary change in the
5 way telephone service is provided. And the
6 Department would request the Commission adopt
7 staff's option number one in this particular
8 case. Thank you.

9 CHAIR KOPPENDRAYER: Thank you. Is
10 there questions of Mr. Alpert? Mr. Wilhelm, I
11 have to share something with you that I'm trying
12 to overcome here. Because I thought about you
13 last night on my way home. I got a long drive,
14 and I've learned from previous Commissioners, and
15 one of them is Commissioner Garvey. When he used
16 to be on the Commission he would -- he would use
17 some analogy to a movie. And I hardly ever go to
18 movies so I never knew what he was talking about,
19 which was probably a good thing. But last night I
20 was going home and I was listening to talk radio.
21 And there's a talk radio show that's hosted by a
22 guy by the name of Soucheray, and he talks about
23 the mystery. And he says the mystery is something
24 that when someone asks you to disbelieve the
25 obvious, what's right in front of you, your own

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1 that this proceeding and this issue, although the
2 Department would like to characterize it as of
3 importance only to Vonage, we believe will have --
4 have a very broad impact on the technologies that
5 are deployed within the state of Minnesota. There
6 are other services too that are not regulated by
7 this Commission that provide similar functionality
8 to a phone service.

9 When I'm on the computer and I'm having
10 a video conversation, perhaps with my neighbor,
11 using an Internet phone or an Internet computer
12 video service, and it happens to be my neighbor,
13 is that a service that's going to be regulated by
14 this Commission because it provides something that
15 is functionally similar? If not, what
16 distinguishes that from a Vonage service? If it's
17 a, you know, Internet chat, what's distinguishes
18 that from a Vonage service?

19 This Commission has not asserted
20 jurisdiction over those services, nor is the
21 Department claiming that those are regulated
22 services. But does it mean that when Microsoft
23 deploys its gaming consoles, that plug-in devices
24 that perform computer to computer -- allow
25 computer to computer conversations between gamers,

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1 is Microsoft providing that as a regulated
2 telephone service? Does that mean that Microsoft
3 needs to become certificated and file tariffs here
4 in the Commission?

5 CHAIR KOPPENDRAYER: Thank you.
6 Ms. Cochran?

7 MS. COCHRAN: Thank you. Good morning.
8 The residential and small business utilities
9 division of the OAG agrees with staff and the
10 Department that the Commission should adopt
11 decision option one. The OAG agrees with the
12 Department and staff that Vonage is providing a
13 telephone service within the meaning of Chapter
14 237 and it's subject to the requirements of
15 Chapter 237.

16 Staff correctly recognizes this
17 conclusion is supported by the Supreme Court's
18 decision in Minnesota Microwave. In that case the
19 Supreme Court said that telephone service in most
20 cases refers to two-way voice communications.
21 That's exactly what Vonage is providing here. The
22 Supreme Court also said you should look at whether
23 the service being provided really looks like
24 telephone service. Clearly Vonage is promoting
25 this as a telephone service, the consumer views it

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1 as telephone service, it is telephone service. If
2 it looks like a duck, if it quacks like a duck,
3 it's a duck. This is telephone service.

4 Finally, the Supreme Court recognized
5 that the Commission's jurisdiction is not
6 stagnant, but can change as technology surrounding
7 telephone service changes. Therefore, the fact
8 that Vonage -- Vonage's service does not go solely
9 over the public switched network does not take it
10 outside of the Commission's jurisdiction. The
11 Commission has the flexibility to regulate this
12 type of service, and in fact this service falls
13 within the Supreme Court's definition of telephone
14 service.

15 The OAG also believes that finding that
16 jurisdiction exists is not only consistent with
17 the Supreme Court's decision and the existing
18 statutory scheme, but it's necessary to further
19 the legislature's intent that all Minnesotans have
20 adequate, reliable telephone service. The
21 legislature has long recognized that Minnesotans
22 need adequate, reliable phone service for health,
23 safety and other needs. And that's recognized in
24 237.06 and 237.011. Regulation of Vonage's phone
25 service is necessary just to make sure that

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1 customers in Minnesota that sign up for Vonage's
2 service get what they think they're getting,
3 adequate telephone service.

4 There's no exception for voice over
5 Internet telephone service in the definition of
6 telephone company, yet there is a definition for
7 wireless service or radio common carrier. So the
8 legislature has not carved out an exception for
9 this type of service as they have done in other
10 instances. If Vonage doesn't think this service
11 should be subject to Chapter 237, it should go to
12 the legislature and seek that exception, but
13 clearly now it's within the confines of the
14 statutory scheme. And as the Department correctly
15 points out, Vonage's service is a
16 telecommunications service within the meaning of
17 the Federal Act.

18 So we submit that the Vonage's arguments
19 to the contrary are unpersuasive. Vonage argues
20 that the Commission should ignore the reality that
21 Vonage's service is being promoted and used as
22 basic telephone service. Instead, Vonage urges
23 the Commission to base its decision on a technical
24 distinction that's invisible to the consumer.
25 This line of reasoning has already been rejected

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1 by the state Supreme Court in Minnesota
2 Microwave. In that case the Court looked at the
3 functionality of the service to say what is
4 this -- what does this look like.

5 Similarly, as the Department points out
6 in their complaint, the FCC looks at the
7 functionality of the service. Vonage argues it's
8 an information service, but at the same time it's
9 promoting it as a telephone service. So they are,
10 you know, their argument is questionable on its
11 face. And as Mr. Alpert pointed out, there is no
12 expressed preemption here, the threat of
13 preemption should not stop the Commission from
14 regulating where it has an obligation to do so.

15 The Commission needs to assert
16 jurisdiction to fulfill its duty to ensure that
17 Minnesota consumers have adequate, reliable phone
18 service. If you decline to assert your
19 jurisdiction you'll be creating a giant loophole
20 in the regulatory framework that will allow and
21 encourage other telephone companies to avoid
22 meeting existing legal requirements by using a
23 framework such as Vonage does.

24 Furthermore, if you do not assert
25 jurisdiction, the Commission will be creating an

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1 arbitrary situation where some basic telephone
2 service is regulated, but other basic telephone
3 service is not. The result will be that the
4 consumer will not be able to distinguish between
5 the two and will be surprised and frustrated to
6 find out that their telephone service is not
7 really regulated phone service like the phone
8 service they thought they were getting and that
9 they had in the past.

10 Finally, no party is suggesting that
11 Vonage cannot offer the service, but rather that
12 it needs to do it in compliance with the laws of
13 this state. Thank you.

14 CHAIR KOPPENDRAYER: Questions of
15 Ms. Cochran? Who wants to go next? Mr. Weigler,
16 did you have a comment? A short one?

17 MR. WEIGLER: Thank you, Chair
18 Koppendraye, members of the Commission. Steve
19 Weigler, from AT&T. I haven't entered my
20 appearance because we petitioned to be a
21 participant and not an intervenor, and I just want
22 that corrected for the record. However, a
23 participant has the opportunity to participate in
24 oral argument if the Commission allows, and I just
25 would like to make some brief comments, if it's

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1 switched network.

2 So you have a completely different
3 technology here. Much more similar to the
4 technology of wireless than it is to the
5 technology of a switched network. The Minnesota
6 Microwave case says you have to look at telephone
7 service as a question allowed determined on the
8 basis of operative facts determined by the
9 Commission. At the time of this decision there
10 was no such thing as voice over IP. This is
11 relatively new technology, and technology that
12 really doesn't set -- has nothing to do with the
13 facts of the Minnesota Microwave, that had to do
14 with microwave telecommunications, this has to do
15 with completely brand new technology that kind of
16 goes into a cloud. And based on that it has a
17 multitude of jurisdictional issues. It's not as
18 clear, I don't believe, just based on the
19 Minnesota Microwave case, the facts of this case
20 are extremely complex, and aren't -- aren't nearly
21 as clear as the Department and the OAG wish to
22 think on this issue.

23 CHAIR KOPPENDRAYER: See, I was afraid
24 somebody would say there really is a mystery. Now
25 it's a cloud.

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1 okay.

2 Listening to Mr. Alpert, he talks about
3 technology being -- that it shouldn't be based on
4 one technology, it should be technology neutral.
5 But, unfortunately, there's a patchwork of
6 regulations related to a different technology.
7 For example, if I make a telephone call on
8 wireless service, it's not regulated the same way
9 by this Commission as it is as wireline service.

10 I went and checked out -- when I was at
11 NARUC I went and checked out what this technology
12 involves and it was at a presentation over at the
13 Hyatt in Denver. What this technology involves
14 is, basically, it converts into packets the moment
15 you make the telephone call. And the packets
16 could go a million different places, literally,
17 and it could go to -- one packet could route
18 through New York, one packet could route through
19 just Minnesota. And then they get together in
20 this kind of cloud that they call the Internet
21 cloud. Because that's the Internet protocol. And
22 then it gets together, and then, and only then,
23 does it get to a gateway, and the gateway then
24 goes over possibly, if it's not Vonage on the
25 other side, only then does the gateway go over the

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1 MR. WEIGLER: It's a cloud. And, I
2 mean, I don't know, I'm just an attorney, so I
3 don't really know how the voice over IP, like how
4 exactly it works, but I know that there's packets
5 flying everywhere. And so it breaks it up, the
6 moment it gets to the system, it's not like
7 there's ever a point, just because you have a
8 telephone receiver that's enhanced, the moment it
9 gets past that, it's just got nothing to do with
10 the switched network, and therefore the
11 jurisdictional arguments are completely different
12 than you would have in a normal setting. Based on
13 that and based on the fact that AT&T is right now
14 a participant and wants to participate, I think
15 the Commission needs to take a much harder look at
16 it than just looking at one piece of case law
17 saying, oh, those facts, which have to do with --
18 just say that you have to look at the operative
19 facts, that's basically the law of that case. And
20 make a determination that it's telephone service
21 when this, I'm not sure of the year, 1971
22 opinion --

23 CHAIR KOPPENDRAYER: But Mr. Weigler --

24 MR. WEIGLER: It really has completely
25 different facts.

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1 CHAIR KOPPENDRAYER: -- is there any
2 assurance that when I pick up the phone in my
3 office and call a commissioner in France that that
4 -- that that particular transaction transmission
5 never turns into a digital packet of data?

6 MR. WEIGLER: My understanding, if
7 you're calling through Vonage --

8 CHAIR KOPPENDRAYER: No, I mean, I'm not
9 calling through Vonage.

10 MR. WEIGLER: Okay.

11 CHAIR KOPPENDRAYER: But I'm calling
12 somebody else in another country, and I would bet
13 that that turns into a digital packeted data
14 somewhere along the way.

15 MR. WEIGLER: But it -- the difference
16 is in Vonage's service you know it never is
17 switched. Only when it hits the gateway does it
18 become a switched service.

19 CHAIR KOPPENDRAYER: It has to --

20 MR. WEIGLER: So Vonage, and Vonage
21 doesn't own any switched services. If I could
22 draw it on the board.

23 CHAIR KOPPENDRAYER: A Vonage call ends
24 up on my copper loop in rural Minnesota.

25 MR. WEIGLER: And the CLEC that operates

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1 from the gateway and operates the switches is
2 regulated by this Commission.

3 CHAIR KOPPENDRAYER: So it's switched.

4 MR. WEIGLER: So the CLEC is regulated
5 that does the switched network. Just like if you
6 made a call on a wireless line and it ended up at
7 your copper in rural Minnesota --

8 CHAIR KOPPENDRAYER: Princeton.

9 MR. WILHELM: Princeton, right?

10 CHAIR KOPPENDRAYER: Princeton.

11 MR. WEIGLER: In Princeton, Minnesota,
12 the wireless side isn't regulated the same way as
13 wireline, but when it hits that gateway, when it
14 goes over to the switched network to your line,
15 that side is regulated just like any switched
16 network in Minnesota. So there's -- I think the
17 technology is much closer to wireless than it is
18 to a switched network. They drew my a diagram, I
19 mean, it's real easy, if you want to see it.

20 MR. WILHELM: Just on that point,
21 Mr. Chairman, if I may?

22 CHAIR KOPPENDRAYER: Why don't you wait
23 until we finish and then I'll go to Mr. Peterson
24 next. Mr. Johnson, I mean.

25 MR. JOHNSON: Mr. Chairman,

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1 Commissioners, just a few remarks. The MIC agrees
2 with the Department and the Attorney General's
3 Office that you should adopt the recommendation of
4 your staff.

5 The staff really has cut to the chase on
6 this one and they focused on the important points,
7 and that is what's being offered to the consumer.
8 The technology, while it's very interesting and
9 undoubtedly would confuse us all at length, is
10 really irrelevant to the issue. The issue is
11 what's being offered to the consumer and the staff
12 properly focuses on that point.

13 There's been some discussion about FCC
14 decisions on this point and that point, is it
15 telecommunications, is it information services.
16 That's not relevant to Minnesota law, that's
17 relevant to classification of services under the
18 Federal Act. It does not drive your decision
19 here, Minnesota law drives your decision, and the
20 staff has properly analyzed that.

21 AT&T has suggested to you that Vonage's
22 service is more like wireless than like wireline.
23 Interesting point, I don't think I agree with it,
24 but the real key point here is that the
25 legislature was the body that decided that

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1 wireless service should be exempt. They have made
2 no comparable decision with respect to voice over
3 IP, and as Ms. Cochran points out, until they do
4 so you look at the law as it exists and the law as
5 it exists focus on what's offered to the
6 consumer.

7 And, last, to pursue your analogy of
8 digital packets. Chairman, you don't have to go
9 to the analogy of a call from you to someone in
10 France, you can go to the analogy of a call from
11 you to someone across the street. Almost
12 inevitably your analog signal gets turned into
13 digital packets for at least a portion of the
14 route.

15 Technology just doesn't drive your
16 jurisdiction, nor should it drive your policy
17 decisions here. Your policy should be focused on
18 what's offered to the consumer, as the staff has
19 pointed out. I'll be happy to answer any
20 questions. Thank you.

21 CHAIR KOPPENDRAYER: Thank you.
22 Questions of Mr. Johnson? Mr. Merz.

23 MR. MERZ: Thank you, Mr. Chair. MCI
24 supports Vonage's position and agrees that this
25 matter is most appropriately dealt with by way of

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1 a generic proceeding or workshop where all the
2 parties that may have an interest in this issue
3 can be heard.

4 I just want to begin by reminding the
5 Commission where we were when we last heard from
6 Vonage on this issue. And where we were was that
7 the Commission concluded that the Department had
8 failed to show that they were sufficiently likely
9 to succeed on the merits.

10 Now, the Commission appropriately had
11 concerns that this issue was more complicated than
12 it appeared to be, and the Commission
13 appropriately had concerns that it needed to
14 develop a factual record. The record you have
15 before you today is not any better at all than the
16 record you had before you two weeks ago. And all
17 the parties that are urging the Commission to
18 essentially jump over the procedural steps and
19 determine today that the Commission should
20 regulate Vonage, they're really ignoring what the
21 Commission found a couple weeks ago properly, that
22 this issue is much more complicated than the
23 Department would make it out to be. It's one that
24 the FCC and other states have been grappling with,
25 and the FCC and those other states have not

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1 reached a resolution. And to my understanding
2 none of those bodies have settled for the duck
3 test. And so there's more to it than whether this
4 looks like a duck.

5 The issues that are presented by this
6 case implicate a number of important public policy
7 objectives that relate to things like public
8 safety, affordability of rates, technological
9 innovation, the issues implicate factual and
10 technical questions that relate to how this
11 service is provided.

12 Now, the Department is concerned about
13 the risk of under regulation, but what this
14 Commission has recognized in the past is that
15 there are also risks associated with over
16 regulation and discouraging technological
17 innovation, discouraging options that may be
18 available to customers, discouraging economic
19 efficiency.

20 The Commission should take the time to
21 get the facts that are necessary to come to a well
22 reasoned conclusion. And so what procedure? The
23 question before you today is what procedure is
24 best suited to do that? And we agree with Vonage
25 that the best procedure to deal with these broad

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1 policy questions is not one that's focused
2 narrowly on a specific company and relates to
3 allegations made in a specific complaint.

4 The other question that this Commission
5 needs to think about is whether your analysis
6 would benefit from the work that the FCC is now
7 doing in this area. This is an issue that the FCC
8 is grappling with, has made one of their
9 priorities, and from our perspective we believe
10 that the Commission's analysis would benefit by
11 looking to the FCC. We recognize that we don't
12 always know when the FCC will act, but we do know
13 that this is something that is very high on the
14 FCC's radar screen and one that the FCC will be
15 dealing with and will, we hope, provide some
16 guidance to this Commission.

17 But the bottom line is, certainly the
18 record today isn't adequate to allow the
19 Commission to decide that Vonage should be
20 regulated as a telephone company, and the question
21 the Commission ought to determine today is how do
22 you get that record. Thank you.

23 CHAIR KOPPENDRAYER: Questions of
24 Mr. Merz? Mr. Dobras?

25 MR. DOBRAS: Mr. Chairman,

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1 Commissioners, thanks for the opportunity to
2 address you on this subject today. First of all,
3 Sprint does believe that the service that we have
4 heard described is functionally equivalent to
5 local and long-distance service. At issue of
6 whether or not it's converted to packet switching
7 at some point during the transmission process is a
8 bit of a -- a cloud issue, to be frank.

9 CHAIR KOPPENDRAYER: Or a mystery or a
10 duck.

11 MR. DOBRAS: Yeah. Conversion to packet
12 switching is increasingly commonly a technology
13 used for both conventional, local and conventional
14 long-distance telephone services by the public
15 switched telephone network.

16 There are some additional issues that
17 may need to be addressed on this down the road,
18 and those have to do with the jurisdiction and
19 intercarrier compensation for the traffic
20 carried. The complaint so far has not addressed
21 those issues. Sprint is involved in an
22 arbitration in Florida regarding compensation
23 between carriers for traffic, and whether -- and
24 has argued there that the point of origin and the
25 point of termination of the call determine the

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1 jurisdiction for purposes of intercarrier
2 compensation. So some of those issues may
3 appropriately need be spun off.

4 CHAIR KOPPENDRAYER: We're not going
5 there today though.

6 MR. DOBRAS: But so far as your decision
7 today, we view the services functionally
8 equivalent to voice telephone service.

9 CHAIR KOPPENDRAYER: Thank you.
10 Questions of Mr. Dobras? Mr. Wilhelm, you wanted
11 a comment?

12 MR. WILHELM: Yes, thank you,
13 Mr. Chairman. To your point earlier, I guess I
14 would say that if this were so clear as if it
15 looks like a duck, regulate it like a duck.

16 CHAIR KOPPENDRAYER: That was the
17 Attorney General.

18 MR. WILHELM: Right.

19 CHAIR KOPPENDRAYER: Mine was more in
20 relation to the cloud.

21 MR. WILHELM: No, right. I would agree
22 with the cloud analogy, because as Mr. Weigler
23 pointed out, there are issues about where the
24 packets are transmitted to, whether those packets
25 are interstate or intrastate. If they're

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1 think there are a number of contested material
2 factual issues before the Commission. There's
3 contested issues about whether there's protocol
4 conversion, whether the CPE is similar, whether
5 the risk to consumers about the way the 911 calls
6 are routed, whether these are even interstate or
7 intrastate calls subject to the jurisdiction of
8 this Commission. So there are material contested
9 facts I think here, number one.

10 Number two, we would assert that the
11 FCC, in fact the regime that Congress in the
12 Communications Act in Title Two, where it created
13 two mutually exclusive classes of service,
14 telephone service, regulated basic services, and
15 enhanced services, information service.
16 Information services that are not regulated
17 telephone services. That that -- that that
18 framework would apply across the board.

19 CHAIR KOPPENDRAYER: So you're arguing
20 that this is not a basic telephone service?

21 MR. WILHELM: That is correct.

22 CHAIR KOPPENDRAYER: So --

23 MR. WILHELM: In part because of the way
24 it's provided.

25 CHAIR KOPPENDRAYER: Even though someone

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1 intrastate, are they subject to the jurisdiction?
2 I think in some of our documents we've indicated
3 that all the packets and all the information is
4 transmitted on an interstate basis to our gateway
5 in California, so there's a question about
6 jurisdiction.

7 CHAIR KOPPENDRAYER: So tell me just
8 briefly, and maybe some of the commissioners
9 already know this, but again state for me, what,
10 what do I use, what rule or statute do I use that
11 preempts you, Vonage, from complying with
12 Minnesota Statute and rules as it pertains to 911,
13 for example?

14 MR. WILHELM: I'm sorry, what rule do
15 you use?

16 CHAIR KOPPENDRAYER: Yeah, what -- I got
17 to have a reason to say this preempts Minnesota
18 law as far as you complying with our 911 rules.

19 MR. WILHELM: Sure. Well, the question
20 before you is whether this is a telephone service
21 under Minnesota Statutes.

22 CHAIR KOPPENDRAYER: So if I decide
23 that, then there is no rule that preempts
24 Minnesota Statute, right?

25 MR. WILHELM: The, I mean, number one, I

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1 picks up the phone, whether they, you know, I walk
2 into my friend's house, I pick up the phone and I
3 want to dial somebody, I want to dial my wife at
4 home, and everything works just like it does so my
5 assumption is --

6 MR. WILHELM: But that's not true.

7 CHAIR KOPPENDRAYER: I pick up the phone
8 and dial the number and she answers the phone on
9 the other end.

10 MR. WILHELM: You'd need a broadband
11 connection, you'd need an Internet service
12 provider --

13 (End of Side A of Tape 03-93.)

14 (Side B of Tape 03-93.)

15 MR. WILHELM: -- a specific computer
16 device attached to that broadband connection.
17 And --

18 CHAIR KOPPENDRAYER: We've done that
19 road before.

20 MR. WILHELM: Right. So it's marketed,
21 despite the fact that there's evidence being --

22 CHAIR KOPPENDRAYER: It's marketed as a
23 phone service and it looks like a phone service.

24 MR. WILHELM: I mean, we have -- the
25 company has to market it so that people understand

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1 functionally what it could do, but it is not
 2 equivalent to a phone service. In fact, I mean,
 3 the terms of service, I think we explored this at
 4 the last meeting, the terms of service are very
 5 different, and what the service -- why the service
 6 is different than a functional equivalent phone
 7 service. We describe what it can do, what it
 8 can't do, what the technical requirements are,
 9 what the requirements are for broadband
 10 connectivity, what the requirements are in the
 11 cost for providing the multi-media device. So, I
 12 mean, I know that the Department would like to say
 13 that we use the word phone service, in fact we use
 14 broadband phone service to market the service
 15 because it is in fact a different service than a
 16 telephone service. You cannot provide -- use your
 17 Vonage phone and your computer device in any
 18 particular phone.

19 COMMISSIONER REHA: I have a question.

20 CHAIR KOPPENDRAYER: Commissioner Reha.

21 COMMISSIONER REHA: Mr. Wilhelm, can you
 22 point to any FCC decision that provides that
 23 states are prohibited from continuing to perform
 24 their public interest and safety obligations,
 25 including certification and 911 standards, when

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1 the carrier in question happens to use voice over
 2 Internet technology?

3 MR. WILHELM: No, I cannot,
 4 Commissioner.

5 COMMISSIONER REHA: Okay. See, in my
 6 view, and I disagree with Mr. Merz, I think the
 7 information that was provided since our last
 8 hearing did provide, the complaint of the
 9 Department, the arguments of the parties and so
 10 forth, provided us a lot more information. And I
 11 think that this is a legal issue under Minnesota
 12 law and not a factual dispute.

13 I think that the FCC hasn't come to a
 14 determination on this, and if they do and they
 15 come to a decision that would -- would make our
 16 decision that this is a telephone service
 17 incorrect, then obviously that takes precedence
 18 over state law. But, in the meantime, what we
 19 have is a law that we have to apply and
 20 interpret.

21 And then if you want to get an exemption
 22 for this technology under state law, I think the
 23 Attorney General makes a very good argument, you
 24 need to go to the legislature to do that as did
 25 wireless. But in the meantime, until the FCC

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1 decides the matter, or until the legislature tells
 2 us we can't regulate it, I think that we have an
 3 obligation to apply state law.

4 And I think it's a legal issue. And,
 5 you know, in the mean -- you know, I have no
 6 objection if this Commission at some time in the
 7 future wants to set up some kind of a workshop or
 8 a generic docket or something to look at all this,
 9 fine, but right now the issue before us is whether
 10 we apply state law, whether we've been preempted
 11 by the FCC, which we have not, whether there's
 12 another statute that says that we can't regulate
 13 this, which is not there yet, that right now we
 14 apply state law.

15 And it seems to me that our law provides
 16 that we look at function -- functionality and look
 17 at, I think, the case of -- the Microwave case I
 18 think tells us how we do it. And I agree that
 19 that case didn't anticipate this new technology,
 20 but that's not what the case looked at, the case
 21 essentially said whatever the technology is, you
 22 look at the function. And I think that this --
 23 there's no way around it that I can see. And I
 24 think it's great that the FCC is looking at this
 25 and trying to figure out where we draw the line

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1 between what's an information service and what's a
 2 telephone service because it's difficult.

3 But we have previous people with voice
 4 over IP that, you know, are subject to
 5 regulation. I think it was pointed out in the
 6 Department's complaint that Onvoy provides voice
 7 over technology and they continue to be
 8 regulated. So, you know, how -- why do we treat
 9 one party differently than another? I mean, we're
 10 going to have to figure out where to draw the line
 11 and hopefully the FCC and the federal government
 12 will be able to tell us how to do that, but right
 13 now we apply functionality. I don't think there's
 14 any way around it.

15 MR. WILHELM: I mean, again,
 16 Commissioner, if I could respectfully --

17 COMMISSIONER REHA: Sure.

18 MR. WILHELM: -- disagree. I think that
 19 -- that certainly at least a contested case
 20 proceeding would be appropriate here. Because we
 21 really do feel that there are material facts that
 22 are in dispute. I mean, the issue about whether
 23 Onvoy is providing a regulated VOIP service or
 24 not, I think that's the assertion the Department
 25 made, that is not determinative of whether VOIP is

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1 being regulated --

2 COMMISSIONER REHA: No, I'm not saying
3 that that's determinative, I think it's an
4 example, though, of where to draw the line where
5 we don't know where to draw the line at this
6 particular point and what we need to do is apply
7 the state law and let the FCC clarify for us where
8 that line should be drawn. Perhaps we shouldn't
9 be regulating them, or perhaps it's a totally
10 different technology that should or shouldn't be
11 regulated. That I don't know. And if we want to
12 open up some kind of a generic proceeding to look
13 at those issues, that's fine, but I would just as
14 soon to wait for the FCC to figure this all out
15 and tell the states what we should do.

16 MR. WILHELM: Right. And we would
17 respectfully ask that there would be a contested
18 case proceeding to go through the facts that we
19 believe are material to this Commission's
20 consideration and to the determination on a
21 factual basis that it is a telephone service or is
22 not a telephone service. Because there are
23 substantive factual issues which we disagree with.

24 COMMISSIONER REHA: And I understand
25 your argument and I just respectfully disagree

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1 with it, that's all.

2 CHAIR KOPPENDRAYER: You'll have an
3 opportunity to make those arguments in front of
4 the FCC.

5 COMMISSIONER REHA: And, you know, you
6 have your rights under --

7 COMMISSIONER JOHNSON: Hopefully soon.

8 COMMISSIONER REHA: You have your
9 appellate rights, you can go up to the legislature
10 and lobby all you want up there and tell them that
11 you don't think we should regulate it. But right
12 now I think we have -- we have a public obligation
13 as Commissioners to apply state law, as we have
14 interpreted it, based on direction that we've
15 received in previous case law. And, you know,
16 whether I personally disagree with it or not is
17 irrelevant. I think we've just got to apply what
18 the law says.

19 CHAIR KOPPENDRAYER: Any other
20 questions? I have one question. Just a
21 curiosity, Mr. Dobras. Why does Sprint find
22 themselves in a different position than MCI and
23 AT&T? Maybe -- maybe you can turn a light on here
24 for me.

25 MR. DOBRAS: Mr. Chairman, we're

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1 involved in an arbitration in Florida now where
2 Sprint, as a local telephone company, is disputing
3 the treatment proposed by AT&T in their
4 interconnection agreement for intercarrier
5 compensation of traffic that is held by AT&T
6 originating -- or terminating to our Florida
7 customers.

8 CHAIR KOPPENDRAYER: So it's really a
9 matter of who pays when and this will be resolved
10 also.

11 MR. DOBRAS: And out of which tariff.

12 CHAIR KOPPENDRAYER: Yeah. Thank you.
13 How does the Commission wish to proceed?

14 COMMISSIONER JOHNSON: Mr. Chair.

15 CHAIR KOPPENDRAYER: Commissioner
16 Johnson.

17 COMMISSIONER JOHNSON: I move
18 alternative one on page 7, and it continues on on
19 page 8.

20 CHAIR KOPPENDRAYER: Any discussion?
21 All in favor, signify by saying aye.

22 ALL COMMISSIONERS: Aye.

23 CHAIR KOPPENDRAYER: Motion carries,
24 three-zero.

25 And I believe that concludes our agenda

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1 for today. Thank you.
2 (Matter concluded.)

1 STATE OF MINNESOTA)
2) ss.
3 COUNTY OF HENNEPIN)
4

5 REPORTER'S CERTIFICATE
6

7
8 I, Janet Shaddix Elling, do hereby
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